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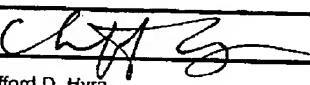
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Filing Date	12/16/2003
First Named Inventor	Christopher T. Evans
Art Unit	3654
Examiner Name	Rakesh Kumar
Attorney Docket Number	Union Street

28

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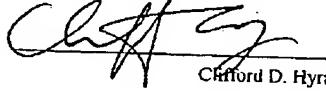
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Clifford D. Hyra

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of

VIA FAX: 571-273-8300

EVANS et al.

Serial No.: 10/734,587

Art Unit: 3651

Filed: December 15, 2003

Examiner: Rakesh Kumar

For: SINGLE DISPENSING FILM STRIP CONTAINER

APPEAL BRIEF

03/06/2008 VBUI11 80000005 10734587

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REAL PARTY IN INTEREST

UNION STREET BRAND PACKAGING is the real party in interest in this case by virtue of an assignment recorded on reel/frame 015133/0526.

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RELATED APPEALS AND INTERFERENCES

No other related appeal or interference is pending.

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STATUS OF CLAIMS

Claims 1 - 10, 15 - 17, and 20 were finally rejected over prior art.

Claims 11 - 14 and 18 - 19 were withdrawn.

Claims 1 - 10, 15 - 17, and 20 are the subject of this appeal, i.e., the final rejection of claims 1 - 10, 15 - 17, and 20 is being appealed to the Board of Patent Appeals and Interferences.

A copy of the appealed claims 1 - 10, 15 - 17, and 20 is appended hereto in the CLAIMS APPENDIX.

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STATUS OF AMENDMENTS

No amendments were presented after the final rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention (Specification pages 3-18; Figures 1-2) relates to a strip dispenser 1 (Figs. 1, 2A-2D, and 3A-3D) as claimed in independent Claim 1 a method of dispensing a strip as claim in independent Claim 15, and a strip dispensing method as claimed in independent Claim 20.

The strip dispenser 1 claimed in Claim 1 comprises a container for holding at least one movable strip (Page 3, lines 13-14), a cover 3 connected to the container (Figs. 1, 2A-2D, 3A-3D, Page 4, lines 3-5), an extension 5 connected to a lever and extending into the container (Figs. 1, 2A-2D, 3A-3D, Page 3, lines 14-16, Page 8, lines 20-21), a tip 51 of the extension 5 having a friction surface 53 for engaging the at least one strip 7 within the container (Figs. 1, 2A-2D, 3A-3D, Page 3, lines 16-17, Page 8, lines 20-23), whereby moving the cover 3 moves the tip 51 of the extension 5 in the container and slides the at least one movable strip 7 outward from the container (Figs. 2A-2D, 3A-3D, Page 3, lines 17-19, Page 9, lines 4-10).

The method claimed in Claim 15 comprises providing a container and a dispensing opening in the container (Figs. 3A-3D, Page 5, lines 11-12), placing at least one strip 7 in the container (Figs. 1, 2A-2D, 3A-3D, Page 5, line 13), engaging the at least one strip 7 with a friction surface 53 on a tip 51 of an extension 5 extending into the container (Figs. 1, 2A-2D, 3A-3D, Page 5, lines 13-15, Page 9, lines 4-6), moving a lever connected to the container (Figs. 2A-2D, 3A-3D, Page 5, line 15), opening the dispensing opening (Page 5, lines 15-16, Page 9, line 6), moving the extension 5 and the tip 51 in the direction of the dispensing opening (Figs. 2A-2D, 3A-3D, Page 5, lines 16-17, Page 9, line 7), and moving the at least one strip 7 toward the dispensing opening and exposing the at least one strip 7 through the opening (Figs. 2A-2D, Page 5, lines 17-18, Page 9, lines 8-10), grasping and removing the exposed strip (Page 9, lines 7)

10-11), moving the lever and the extension 5 in an opposite direction and sliding the side of the tip opposite the friction surface 55 over the at least one strip 7 and closing the dispensing opening (Figs. 1, 2A-2D, 3A-3D, Page 5, lines 18-21, Page 9, lines 11-14).

The method claimed in Claim 20 comprises providing a container holding several strips 71 (Figs. 3A-3D, Page 5, lines 11-13), moving a cover 3 on the container (Figs. 2A-2D, 3A-3D, Page 9, line 4), moving an extension 5 connected to the cover 3 and extending into the container (Figs. 2A-2D, 3A-3D, Page 9, lines 4-6), providing a tip 51 of the extension 5 with a friction surface 53 for engaging an upper strip 7 within the container (Figs. 1, 2A-2D, 3A-3D, Page 5, lines 13-15, Page 8, lines 20-23), whereby moving the cover 3 moves the extension tip 5 in the container and slides the upper strip 7 outward through an end opening in the container (Figs. 2A-2D, 3A-3D, Page 9, lines 4-10).

GROUNDS OF REJECTION

- I. Claims 1 - 10, 15 - 17, and 20 stand rejected under 35 U.S.C. 103(a) as obvious over Krzyzanowski (U.S. patent 3,276,622) in view of Leopoldi (U.S. patent 4,071,165).

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ARGUMENTS

Allowance of all claims is requested. All of the claims distinguish the invention from the references.

The present claims are patentable under 35 U.S.C. 103(a).

In considering the patentability of the present invention, it is requested that the Board consider the invention as a whole, consider the scope and content of the prior art as a whole, consider the differences between the claims at issue and the prior art, and consider the level of ordinary skill in the art to which the invention pertains at the time the invention was made.

Graham v. John Deere Co., 148 USPQ 459, 467 (1966).

THE INVENTION AS A WHOLE

The invention considered as a whole is best described by the appended claims.

PRIOR ART AS A WHOLE

The prior art to which the invention pertains is typified by the references of record.

DIFFERENCES BETWEEN THE INVENTION AND THE PRIOR ART

Each of the present claims defines unique features and each is individually patentable over the prior art.

The test in reviewing rejections under 35 U.S.C. 103 in which the examiner has relied on teachings of several references, is whether the references, viewed individually and collectively, would have suggested the claimed invention to a person possessing ordinary skill in the art, and citing references which merely indicate that isolated elements and/or features recited in the claims are known is not a sufficient basis for concluding that combination of the claimed

elements would have been obvious. In re Kaslow, 217 USPQ 1089 (Fed. Cir. 1983); In re Deminski, 230 USPQ 313 (Fed. Cir. 1986).

I. Claims 1 - 10, 15 - 17, and 20 are patentable under 35 U.S.C. 103(a) over Krzyzanowski (U.S. patent 3,276,622) in view of Leopoldi (U.S. patent 4,071,165).

Claims 1, 15, 20

The references do not teach or suggest the claimed invention, including a container for holding at least one movable strip, a cover connected to the container, an extension connected to a lever and extending into the container, a tip of the extension having a friction surface for engaging the at least one strip within the container, whereby moving the cover moves the tip of the extension in the container and slides the at least one movable strip outward from the container, and parallel method claim limitations.

MPEP §2141 states "Patent examiners carry the responsibility of making sure that the standard of patentability enunciated by the Supreme Court and by the Congress is applied in each and every case." (Emphasis in original) MPEP §2141 further states "Office policy is to follow Graham v. John Deere Co. in the consideration and determination of obviousness under 35 U.S.C. 103. As quoted above, the four factual inquiries enunciated therein as a background for determining obviousness are as follows: (A) Determining the scope and contents of the prior art; (B) Ascertaining the differences between the prior art and the claims in issue; (C) Resolving the level of ordinary skill in the pertinent art; and (D) Evaluating evidence of secondary considerations." It is respectfully submitted that the August 9, 2007 Office Action does not comply with Office policy at least in that it lacks a resolution of the level of ordinary skill in the pertinent art.

MPEP §2141 also states "When applying 35 U.S.C. 103, the following tenets of patent law must be adhered to: (A) The claimed invention must be considered as a whole; (B) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination; (C) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and (D) Reasonable expectation of success is the standard with which obviousness is determined."

MPEP §2141.02 also states "Ascertaining the differences between the prior art and the claims at issue requires interpreting the claim language, and considering both the invention and the prior art references as a whole." MPEP §2141.02 further states "In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious." (Emphasis in original)

It is respectfully submitted that the Office Action of August 9, 2007, does not consider the prior art or references as a whole and does not consider the claimed invention as a whole, without the benefit of impermissible hindsight. Krzyzanowski teaches a dispensing carton that engages stacked articles and raises them out of the carton to be grasped and removed. (Col. 1, lines 9-15, 48-52) A top moveable member 17 is rotated counter-clockwise, revealing a top opening in a carton 10 and causing the flexible back end 18 of the member to slide across the top tissue 36 of interior tissue stack 35 (Fig. 3), catching on an edge 37 of the tissue and raising it out the top opening created in the carton 10 (Fig. 4, Fig. 5, Fig. 6).

In contrast, Leopoldi is a paper dispenser consisting of a tray on which a stack of paper can be laid and a retainer 17 with dispenser member 22 (Figs. 1-5). When the retainer 17 is pushed down it forces the dispensing member outward, which also pushed the paper outward so

that the end of a sheet of paper projects out beyond the edge of the tray (Fig. 4) for easy grasping and removal.

These are two completely different inventions that operate though different mechanisms. Krzyzanowski teaches a carton with a top opening full of a stack of tissues where the tissues are removed through the top opening by a member that catches on a creased portion of a tissue and raises it through the top opening for removal. Leopoldi teaches a tray with a stack of papers where a lever uses a frictional member to push the top sheet of paper over the edge of the tray. The only similarity is that they both dispense articles one at a time. There would have been no motivation or suggestion to one of ordinary skill in the art to modify Krzyzanowski with any of the teachings of Leopoldi.

The Examiner argues that "It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the dispenser of Krzyzanowski to include the articles contained in the dispenser to be paper strips... because the dispenser apparatus could be used to dispense a wide array of article." Applicant respectfully disagrees.

MPEP §2141.02 teaches "A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention." (Emphasis in original) Paper could not be used in the dispenser carton of Krzyzanowski because Krzyzanowski teaches catching a creased edge of a tissue or similar article with its member and raising it out of the top opening of the carton. Paper does not have a creased edge to be caught and could not be raised out of the carton. If a portion of the paper could somehow be raised out of the carton, the sheet of paper would be badly creased or torn as it was forced out of the small top opening, unlike tissue which is flexible and not easily deformable.

When the references are considered as a whole, they do not suggest the desirability and thus the obviousness of making the combination. "[T]he mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification". In re Fritch, 23 USPQ2d 1783, 1784 (CAFC, August 1992).

Similarly, with regard to the high friction surface, the Examiner argues that "It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the dispenser of Krzyzanowski to include... a friction surface at the tip of the extension as taught by Leopoldi because... the high friction surface would provide a better friction contact between the tip of the extension and the top most strip in the stack." Applicant respectfully disagrees. As clearly shown in Figure 4 of Krzyzanowski, frictional contact between the tip of the extension and the tissue is irrelevant. Krzyzanowski operates by inserting the member under an edge of the tissue and raising it out of the dispenser.

In fact, a frictional surface would render Krzyzanowski inoperable for its intended purpose. It is well established, that if a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. In re Gordon, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). See MPEP§ 2143.01(V).

Krzyzanowski relies on a low friction extension to accomplish its purpose. The member slides across the articles with sufficient force to bend the member (Fig. 3), which causes the tip to slide under the creased edge of the tissue when it is rotated. If the member had a friction tip as in Leopoldi, instead of sliding freely across the tissues, the tip would catch on the articles and force them forwards against the front of the box, causing the tissues to crease and bunch up

against the front of the carton and not to be dispensed as desired. A high friction tip as taught by Leopoldi could not slide under the creased edge of a tissue as required by Krzyzanowski.

Again, when the references are considered as a whole, they do not suggest the desirability and thus the obviousness of making the combination. Without a motivation for combining the references, there is no prima facie case of unpatentability and the claims must be allowed. The present invention, taken as a whole, would not be obvious from the references, taken as a whole. Only by relying on impermissible hindsight motivation found in the present Application could the references be combined to come up with the claimed invention.

For at least that reason, the rejection of Claims 1, 15, and 20 under 35 U.S.C. 103(a) over Krzyzanowski in view of Leopoldi is improper and should be withdrawn. Claim 15 also teaches sliding the side of the tip opposite the friction surface over the at least one strip and closing the dispensing opening, which is not taught or suggested by the references. Claims 2-10 and 16-17 depend from patentable Claims 1 and 15, respectively, and add further patentable limitations.

"To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations." *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991) (emphasis added).

In addition to lacking any suggestion or motivation for combination, Krzyzanowski and Leopoldi, alone or in combination, fail to teach or suggest all the claim limitations of Claims 2-10, 16-17, and 20.

Claim 2

Claim 2 adds to Claim 1 that the cover is the lever and is pivoted on a hinge connected to the container. The references do not teach or suggest this feature.

Claim 3

Claim 3 adds to Claim 1 that the extension extends in a direction from the hinge opposite a direction of the lever. The references do not teach or suggest this feature.

Claim 4

Claim 4 adds that a friction side is found on one side of the extension and not the other, not found in Krzyzanowski or Leopoldi. The Examiner apparently agrees (Office Action of August 9, 2007, Page 4) but argues that "It would have been obvious... to modify the dispenser... such that the friction surface is disposed at the bottom side of the member... because manufacturing the dispenser would be easier and more cost effective."

Applicant cannot agree. Applicant traversed the Examiner's holding of obviousness without citing to prior art (11/09/07 Response, Page 11). The use of a friction coating on one side but not the other of an extension in a film dispensing container is not obvious from the prior art at least because the use of that element is the invention of the Applicant and because neither reference would benefit from such a modification. Applicant previously requested that the Examiner produce some evidence of obviousness or withdraw the rejection (11/09/07 Response, Page 11). Applicant presumes that the Examiner is taking "Official Notice" under MPEP § 2144.03 that this element is known or suggested in the prior art. Otherwise, the prior art fails to teach or suggest every element of Claim 4 and the claim should be allowed. Similarly, Applicant presumes that the Examiner is taking "Official Notice" under MPEP § 2144.03 that this element

would be easier and more cost effective to manufacture. Otherwise, there would be no motivation to make the proposed modification.

MPEP § 2144.03(A) states that "Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known." (emphasis added) That the use of a friction coating on one side but not the other of an extension in a film dispensing container is known or suggested by the prior art is not capable of instant and unquestionable demonstration as being well-known. This is demonstrated by the complete lack of evidence of such a limitation in the record.

That this element would be easier and more cost effective to manufacture is similarly not capable of instant and unquestionable demonstration as being well-known. This is demonstrated by the complete lack of evidence of such a limitation in the record. How can the Examiner know, without even looking to the prior art, that manufacturing the dispenser would be easier and more cost effective if a friction coating was on only one side of the member? That element could easily make the manufacturing process more difficult by eliminating cost-effective means of conveying the friction tip, such as complete coating.

A holding of Official Notice is thus improper in this case. Furthermore, MPEP §2144.03(C) states that "If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained." Applicant traversed the taking of official notice in the Response of November 9, 2007, and the Examiner has not provided any documentary evidence. Therefore, the rejection cannot be maintained.

Claim 5

Claim 5 adds to Claim 4 a dispensing opening at one end of the container and a closure connected to the lever for moving with the lever and closing the opening when the lever is aligned with the container, and for uncovering the opening when an end of the lever is moved away from the container. The references do not teach or suggest this feature.

Claim 6

Claim 6 adds to Claim 5 that the lever is a lid on an upper surface of the container for opening at least a part of the upper surface of the container. The references do not teach or suggest this feature.

Claim 7

Claim 7 adds to Claim 5 that the extension is flexible and has a relatively slippery surface on a side opposite the friction surface for sliding over a next adjacent strip. The references do not teach or suggest this feature.

Claim 8

Claim 8 adds that a top strip in the stack slides along a next adjacent strip outward through the opening when the lever is moved. Krzyzanowski and Leopoldi do not teach or suggest this feature. The Examiner has not suggested otherwise. In Krzyzanowski, the tissues do not slide across each other, but are raised straight up through a top opening. The tissues are too high-friction to slide over one another and in any case the opening in the carton does not extend all the way across the front or all the way to the bottom, making it impossible to slide the tissues along each other and outward through an opening. For these same reasons, it would be impossible to modify Krzyzanowski with the teachings of any other reference that teaches this element.

Claim 9

Claim 9 adds to Claim 8 that the dispensing opening extends substantially over an entire end of the container. The references do not teach or suggest this feature. There is no end in Leopoldi. The opening is not over the entire end in Krzyzanowski.

Claim 10

Claim 10 adds to Claim 9 that the lever comprises a lid hinged at one end to a central portion of a top of the container and extending outward to the opening in the end of the container for exposing at least a portion of the stack of strips in the container. The references do not teach or suggest this feature.

Claim 16

Claim 16 adds to Claim 15 that initiating of the moving of the lever moves the tip of the extension inward in the container and toward the at least one strip, and that completing the moving of the lever and extension in the opposite direction moves the tip of the extension away from a next adjacent at least one strip. The references do not teach or suggest this feature.

Claim 17

Claim 17 adds to Claim 16 opening and closing the dispensing opening by moving the lever. The references do not teach or suggest this feature.

Thus, there is no prima facie case of obviousness with respect to any of the claims.

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LEVEL OF ORDINARY SKILL IN THE ART

A person having ordinary skill in the art is an artisan being taught the reference teachings.

SUMMARY

Each of the present claims is patentable under 35 U.S.C. 102(e) over the prior art of record.

When considering the present invention as a whole and the prior art to which the invention pertains as a whole, when considering the differences between the present invention and the prior art, and when considering the level of ordinary skill in the art to which the invention pertains, it is clear that the invention would not have been obvious under 35 U.S.C. 103(a) to a person having ordinary skill in the art at the time the invention was made.

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CONCLUSION

Reversal of the Examiner and allowance of all the claims are respectfully requested.

Respectfully,



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Date: 3/5/08

CLAIMS APPENDIX**Appealed Claims:**

1. A strip dispenser comprising a container for holding at least one movable strip, a cover connected to the container, an extension connected to a lever and extending into the container, a tip of the extension having a friction surface for engaging the at least one strip within the container, whereby moving the cover moves the tip of the extension in the container and slides the at least one movable strip outward from the container.
2. The apparatus of claim 1, wherein the cover is the lever and is pivoted on a hinge connected to the container.
3. The apparatus of claim 2, wherein the extension extends in a direction from the hinge opposite a direction of the lever.
4. The apparatus of claim 3, wherein the friction surface is on a side of the extension opposite from the top of the lever and not another side of the extension.
5. The apparatus of claim 4, further comprising a dispensing opening at one end of the container and a closure connected to the lever for moving with the lever and closing the opening when the lever is aligned with the container, and for uncovering the opening when an end of the lever is moved away from the container.
6. The apparatus of claim 5, wherein the lever is a lid on an upper surface of the container for opening at least a part of the upper surface of the container.
7. The apparatus of claim 5, wherein the extension is flexible and has a relatively slippery surface on a side opposite the friction surface for sliding over a next adjacent strip.
8. The apparatus of claim 5, wherein the at least one strip comprises a stack of aligned strips, and wherein a top strip in the stack slides along a next adjacent strip outward through the opening when the lever is moved.

APP A 1

10/239,148

9. The apparatus of claim 8, wherein the dispensing opening extends substantially over an entire end of the container.

10. The apparatus of claim 9, wherein the lever comprises a lid hinged at one end to a central portion of a top of the container and extending outward to the opening in the end of the container for exposing at least a portion of the stack of strips in the container.

15. A method of dispensing a strip, comprising providing a container and a dispensing opening in the container, placing at least one strip in the container, engaging the at least one strip with a friction surface on a tip of an extension extending into the container, moving a lever connected to the container, opening the dispensing opening, moving the extension and the tip in the direction of the dispensing opening, and moving the at least one strip toward the dispensing opening and exposing the at least one strip through the opening, grasping and removing the exposed strip, moving the lever and the extension in an opposite direction and sliding the side of the tip opposite the friction surface over the at least one strip and closing the dispensing opening.

16. The method of claim 15, wherein initiating of the moving of the lever moves the tip of the extension inward in the container and toward the at least one strip, and wherein completing the moving of the lever and extension in the opposite direction moves the tip of the extension away from a next adjacent at least one strip.

17. The method of claim 16, further comprising opening and closing the dispensing opening by moving the lever.

20. A strip dispensing method, comprising providing a container holding several strips, moving a cover on the container, moving an extension connected to the cover and extending into the container, providing a tip of the extension with a friction surface for engaging

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an upper strip within the container, whereby moving the cover moves the extension tip in the container and slides the upper strip outward through an end opening in the container.

APP A 3

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EVIDENCE APPENDIX

Original application, office actions and references of record.

APP B 1

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RELATED PROCEEDINGS APPENDIX

There are no related proceedings.

APP C 1